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Justifying Facial Discrimination by Government Defendants under the Fair Housing Act: Which Standard to Apply

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NOTES

Justifying Facial Discrimination by Government Defendants Under the Fair Housing Act: Which Standard to Apply?

I. INTRODUCTION

Since its inception, the Fair Housing Act[1] has played a vital role in the exposure and reduction of housing discrimination.[2] Victims of housing discrimination can use several theories to establish a prima facie case under the Fair Housing Act,[3] one of which is the facial discrimination theory, which applies when a law or policy discriminates against members of a protected group on its face.[4] While there appears to be no debate over how a plaintiff establishes a prima facie case of facial discrimination, several of the United States Courts of Appeals are split regarding the standard that reviewing courts should use when they examine a defendant's asserted justifications for the discriminatory treatment.[5] Of the circuits that have dealt with this issue, three have adopted a rigorous standard that is more favorable to plaintiffs, while only one has adopted a more encompassing standard that grants great deference to the defendant's justification in cases that involve discrimination against certain protected classes.[6]

This Summary will discuss the standard that the Sixth, Ninth, and Tenth Circuits have adopted, as well as the opposing viewpoint of the Eighth Circuit. In discussing the various standards that courts of appeals have adopted, this Summary will demonstrate that the standard currently employed by the Eighth Circuit fails to adequately prevent and protect citizens from housing discrimination, as intended by the Fair Housing Act. The Summary will ul-

1. 42 U.S.C. §§ 3601-3631 (2006).

2. In 2006 alone, the aggregate number of housing discrimination complaints made to the National Fair Housing Alliance, the Fair Housing Assistance Program, the Department of Housing and Urban Development, and the Department of Justice totaled 27,706. NAT'L FAIR HOUS. ALLIANCE, THE CRISIS OF HOUSING SEGREGATION: 2007 FAIR HOUSING TRENDS REPORT 26 (2007), *available at* http://www.nationalfairhousing.org/resources/newsArchive/2007%20Fair%20Housing%20Trends%20Report.pdf.

3. *See infra* notes 10-15 and accompanying text.

4. *See infra* notes 16-21 and accompanying text.

5. *See* discussion *infra* Parts II.B-C, III.

6. *See infra* notes 114-15 and accompanying text.

timately conclude that the Sixth, Ninth, and Tenth Circuits have applied the appropriate standard, and that the Eighth Circuit needs to join those Circuits in applying a standard that encourages those wronged by housing discrimination to challenge unfair housing policies and practices.

II. LEGAL BACKGROUND

A. The Fair Housing Act and Discrimination

The Fair Housing Act makes it unlawful "[t]o refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex, familial status, or national origin."[7] Additionally, it is unlawful "[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap."[8] Courts have interpreted the phrase "otherwise make unavailable" broadly, and have generally held that practices such as zoning restrictions that have a discriminatory impact on protected groups of people are prohibited by the Fair Housing Act.[9]

A plaintiff can establish a prima facie case of unlawful discrimination in violation of the Fair Housing Act by using one of two theories: disparate treatment or disparate impact.[10] Under a disparate treatment theory, "a plaintiff can establish a prima facie case by showing that animus against the protected group 'was a significant factor in the position taken.'"[11] Under a disparate impact theory, on the other hand, "a prima facie case is established by showing that the challenged practice of the defendant 'actually or predictably results in . . . discrimination; in other words that it has a discriminatory ef-

7. 42 U.S.C. § 3604(a) (2006).

8. *Id.* § 3604(f)(1).

9. *See* LeBlanc-Sternberg v. Fletcher, 67 F.3d 412, 424 (2d Cir. 1995).

10. *Id.* at 425. A disabled plaintiff may also claim that he or she was unlawfully discriminated against in violation of the Fair Housing Act under a theory of reasonable accommodation. *See* 42 U.S.C. § 3604(f)(3)(B). To prevail on a reasonable accommodation theory, "a person with a disability must demonstrate that (1) a request for an accommodation was made, (2) such request was either ignored or denied, (3) the accommodation was necessary to enable the person an equal opportunity to use and enjoy the dwelling of that person's choice, and (4) the accommodation was reasonable." Robert L. Schonfeld, *"Reasonable Accommodation" Under the Federal Fair Housing Amendments Act*, 25 FORDHAM URB. L.J. 413, 423 (1998) (citing Bryant Woods Inn, Inc. v. Howard County, Md., 124 F.3d 597 (4th Cir. 1997)).

11. *LeBlanc-Sternberg*, 67 F.3d at 425 (emphasis omitted) (quoting United States v. Yonkers Bd. of Educ., 837 F.2d 1181, 1226 (2d Cir. 1987)).

fect.'"[12] The major difference between these two theories of discrimination is that in a disparate impact case, the plaintiff does not have to prove that the discrimination was intentional in order to prevail.[13] However, in a disparate treatment case, the plaintiff is required to show that a "'discriminatory purpose was a motivating factor.'"[14] In either a disparate treatment or disparate impact case, once the plaintiff establishes his or her prima facie case of discrimination, the burden will shift back to the defendant, who will then have the opportunity to attempt to justify his or her actions and avoid liability.[15]

There is also a subgroup of disparate treatment cases that proceed on a theory known as facial discrimination.[16] This type of case arises when a legislative act or any other rule or policy applies different rules to a protected group of people than are applied to another group of people.[17] Such an act or policy should be easy to identify because, by simply reading the rule, it will be apparent on its face that it treats two groups of people differently and, therefore, is discriminatory.[18] Despite the fact that facial discrimination cases are considered to be disparate treatment cases, which generally require proof of some level of intent, "'[w]hether [a] . . . practice involves disparate treatment through explicit facial discrimination does not depend on why the [defendant] discriminates but rather on the explicit terms of the discrimination.'"[19] Therefore, a plaintiff proceeding under a facial discrimination theory establishes a prima facie case "merely by showing that a protected group has been subjected to explicitly differential – i.e. discriminatory – treatment."[20] As with disparate impact cases and general disparate treatment cases, after the plaintiff establishes this prima facie case, the defendant has the opportunity to demonstrate that, despite the differential treatment, his or

12. Huntington Branch, NAACP v. Town of Huntington, 844 F.2d 926, 934 (2d Cir. 1988) (quoting United States v. City of Black Jack, 508 F.2d 1179, 1184 (8th Cir. 1974)), *aff'd per curiam*, 488 U.S. 15 (1988).

13. *Id.*

14. Smith & Lee Assocs. v. City of Taylor, 102 F.3d 781, 790 (6th Cir. 1996) (quoting Village of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 270 (1977)).

15. *See, e.g.*, *Huntington Branch*, 844 F.2d at 936 ("[o]nce a prima facie case of adverse impact is presented . . . the inquiry turns to the standard to be applied in determining whether the defendant can nonetheless avoid liability under Title VIII").

16. Schonfeld, *supra* note 10, at 422.

17. *See* Bangerter v. Orem City Corp., 46 F.3d 1491, 1500 (10th Cir. 1995). Both private and governmental actors are capable of passing discriminatory rules, and the analysis of facial discrimination will vary depending on which type of defendant is involved. This Summary will focus on the analysis used when public entities pass discriminatory ordinances or policies.

18. *Id.*

19. *Id.* (quoting Int'l Union, United Auto., Aerospace & Agric. Implement Workers v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991)).

20. *Id.* at 1501.

her actions were justified.[21] It is at this point in the analysis of facial discrimination cases that a controversy has arisen and a circuit split has developed.

B. Sixth and Tenth Circuits on Facial Discrimination

The Tenth Circuit was one of the first United States Courts of Appeals to consider a municipality's facially discriminatory housing policy.[22] In *Bangerter*, the plaintiff, a mentally disabled man, was sent to live in a group home after being released from the Utah State Developmental Center.[23] Shortly after the plaintiff's arrival at the group home, it was discovered that the home did not have a conditional use permit, which was required under a city ordinance.[24] The home applied for and eventually received the required permit, but it was contingent on the home's compliance with two conditions: twenty-four hour supervision of the home's residents and creation of a committee which would address citizen complaints and concerns about the home.[25] The plaintiff then filed a lawsuit against the city, alleging that the conditions imposed by the conditional use permit were not imposed on other non-handicapped persons and thus were discriminatory, in violation of the Fair Housing Act.[26]

The district court determined that the plaintiff "did not allege that [the city] acted with a discriminatory motive, and thus could not state a claim for discriminatory intent."[27] The Tenth Circuit, however, disagreed with the district court on the basis that the conditional use permit requirements were facially discriminatory.[28] The court pointed out that when a policy or requirement blatantly discriminates against a group of people protected by the

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21. *Id.* n.17.

22. *See Bangerter*, 46 F.3d 1491.

23. *Id.* at 1494.

24. *Id.* at 1495.

25. *Id.* at 1495-96.

26. *Id.* at 1496. The specific allegations in the plaintiff's complaint included the following:

> the conditions severely and intentionally discriminated against him because of his handicap, invaded his privacy, restricted his ability to enjoy an independent and normal living setting, restricted his ability to live in the residence of his choice because of his handicap, [and] placed conditions on his living arrangement that are not imposed on non-handicapped persons.

Id. n.7.

27. *Id.* at 1499. Further, the district court recognized that the statute permitted differential treatment on its face, but determined that such treatment (the required conditional use permit) was "rationally related to the legitimate governmental interest of ensuring integrated housing for the disabled" and was not sufficient to establish a cause of action. *Id.* at 1500.

28. *Id.*

Fair Housing Act, less proof is required to establish a prima facie case.[29] More specifically, "a plaintiff need not prove the malice or discriminatory animus of a defendant to make out a case of intentional discrimination where the defendant expressly treats someone protected by the [Fair Housing Act] in a different manner than others."[30] At the same time, however, the Tenth Circuit noted that facially discriminatory policies should not be automatically invalidated because it is possible that such a policy has a legitimate justification.[31]

Turning to the standard for determining exactly when a facially discriminatory policy is justifiable and should be permitted, the Tenth Circuit determined that the district court had improperly applied a rational relationship test.[32] Instead of applying this test from equal protection jurisprudence, the Tenth Circuit determined that "[t]he proper approach is to look to the language of the [Fair Housing Act] itself, and to the manner in which analogous provisions of Title VII have been interpreted, in order to determine what justifications are available to sustain intentional discrimination."[33] The court then identified sufficient justifications: the requirement must either be rooted in individualized public safety concerns or clearly be for the benefit of the protected class rather than for the purpose of discriminating against such class.[34] Before remanding the case to the district court to apply the new standard, the Tenth Circuit made a point to remind courts applying this standard that a certain level of flexibility will be necessary for the Fair Housing Act to reach the potential Congress intended it to have.[35]

In 1996, a year and a half after the Tenth Circuit's decision regarding facially discriminatory housing policies, the Sixth Circuit found itself facing a case that presented the same issue.[36] In *Larkin*, the plaintiff applied for a license that would permit her to open an adult foster care center for disabled

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29. *Id.* at 1501.

30. *Id.* As noted in a well-known employment discrimination case, "'the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect.'" *Id.* (quoting Int'l Union, United Auto., Aerospace & Agric. Implement Workers v. Johnson Controls, Inc., 499 U.S. 187, 199 (1991)).

31. *Id.* n.17. In employment discrimination cases, a facially discriminatory police may still be legitimate "if it represents a bona fide occupational qualification ('BFOQ') that is reasonably necessary to an employer's operations." *Id.* (discussing *Johnson Controls, Inc.*, 499 U.S. at 199).

32. *Id.* at 1503. The district court had determined "that the challenged restrictions should be upheld if 'rationally related to a legitimate governmental purpose.'" *Id.*

33. *Id.*

34. *Id.* at 1503-04.

35. *Id.* at 1505.

36. *See* Larkin v. State of Mich. Dept. of Soc. Servs., 89 F.3d 285 (6th Cir. 1996).

persons.[37] Her application was denied due to failure to comply with spacing requirements imposed by the Michigan Adult Foster Care Licensing Act (MAFCLA).[38] MAFCLA prohibited residential facilities like the one in question from being erected within 1,500 feet of another such facility or in a location in which the facility would "substantially contribute to an excessive concentration of state licensed residential facilities."[39] After her application was denied, the plaintiff filed a lawsuit alleging that MAFCLA's spacing requirements violated the Fair Housing Act.[40]

The Sixth Circuit began by discussing the two theories available in housing discrimination cases: disparate impact and disparate treatment.[41] Noting that MAFCLA's spacing requirement only applies to facilities that house disabled persons, like that proposed by the plaintiff, and not to other similar facilities, the court determined that such a facially discriminatory provision raises a claim of disparate treatment.[42] Due to the facial nature of the discrimination, the Sixth Circuit explained that a finding of discriminatory motive was unnecessary and that the burden shifted to the defendant to prove that the challenged provisions were justified.[43] At this point, the court was forced to determine which standard it would apply – the rational relationship standard or the standard announced in *Bangerter*.[44]

The Sixth Circuit ultimately came to the conclusion that its standard would align with the *Bangerter* standard. More specifically, the court decided that "in order for facially discriminatory statutes to survive a challenge under the [Fair Housing Act], the defendant must demonstrate that they are 'warranted by the unique and specific needs and abilities of those handicapped persons' to whom the regulations apply."[45] In applying this standard, the court rejected the defendant's argument that the spacing requirements

37. *Id.* at 287.

38. *Id.* at 287-88.

39. *Id.* at 287. It was possible for the city to waive the spacing requirements and grant the plaintiff's application despite the fact that the proposed facility would be located less than 1,500 feet from another facility, but the city chose not to grant such a waiver. *Id.* at 288.

40. *Id.*

41. *Id.* at 289; *see also supra* notes 10-15 and accompanying text.

42. *Larkin*, 89 F.3d at 289-90.

43. *Id.* at 290.

44. *Id.* When this case had been decided, the rational relationship test had been adopted by the Eighth Circuit in two cases. *See infra* notes 50-73 and accompanying text.

45. *Larkin*, 89 F.3d at 290 (quoting Marburnak, Inc. v. City of Stow, 974 F.2d 43, 47 (6th Cir. 1992)). In *Marbrunak*, the Sixth Circuit rejected a city ordinance that imposed multiple restrictions on housing for disabled persons because it made "no attempt at individualizing its requirements to the needs or abilities of particular kinds of developmental disabilities." *Marbrunak*, 974 F.2d at 47. In *Larkin*, the Sixth Circuit relied heavily on *Marbrunak* for its decision to reject the rational basis test. *Larkin*, 89 F.3d at 290.

were necessary to ensure that the disabled were integrated into the community and to prevent a clustering of facilities with the effect of institutionalizing disabled residents.[46] In regard to the integration argument, the court found no evidence to suggest that disabled persons have a special need for assistance in integration, especially in light of the fact that Michigan prohibits its municipalities from forcing state licensed residential facilities to cluster in one particular area.[47] In analyzing the clustering argument, the court found deinstitutionalization to be a legitimate goal; however, it did not think that the 1,500 foot requirement furthered that goal in any way.[48] Thus, the Sixth Circuit found that MAFLCA's spacing requirement violated the Fair Housing Act.[49]

C. Eighth Circuit on Facial Discrimination

The United States Court of Appeals for the Eighth Circuit first dealt with the issue of facial discrimination under the Fair Housing Act in 1991, before either *Bangerter* or *Larkin* were decided.[50] In *Familystyle*, a company that operated group residential homes in St. Paul, Minnesota requested a permit to add three additional group homes to a campus of homes that already existed.[51] This addition to the campus would result in twenty-one homes being located within a one and a half block area.[52] The city granted the permit on the condition that the company would begin to spread its facilities throughout the city as opposed to clustering all of the homes in the small existing area.[53] When the company failed to meet this condition, the city refused to renew the company's permits and the company challenged a St. Paul city ordinance and a Minnesota state law that prohibited the desired additions, alleging the restrictions were in violation of the Fair Housing Act.[54] More specifically, the St. Paul zoning code required "community residential facilities for the mentally impaired to be located at least a quarter of a mile

46. *Id.*

47. *Id.* at 291. In 1996, when *Larkin* was decided, Michigan had a law which established that state licensed residential care facilities could "not be subject to a special use or conditional use permit or procedure different from those required for other dwellings of similar density in the same zone." MICH. COMP. LAWS § 125.583b(2) (1996), *repealed by* MICH. COMP. LAWS § 125.3702(1)(a) (2006).

48. *Larkin*, 89 F.3d at 291.

49. *Id.* at 292.

50. *See* Familystyle of St. Paul, Inc. v. City of St. Paul, 923 F.2d 91 (8th Cir. 1991).

51. *Id.* at 92.

52. *Id.*

53. *Id.*

54. *Id.*

apart."[55] This code provision mirrored the language that appeared in the challenged Minnesota state law.[56]

The company presented evidence that the ordinance was facially discriminatory and the analysis shifted to an assessment of the purported justifications for the ordinance.[57] The Eighth Circuit assumed that once the plaintiff established a prima facie case of discrimination under the Fair Housing Act, the burden would shift to the defendant to "demonstrate that its conduct was necessary to promote a governmental interest commensurate with the level of scrutiny afforded the class of people affected by the law under the equal protection clause."[58] The district court had applied a strict scrutiny standard, the same level of scrutiny utilized in racial discrimination cases.[59] The Eighth Circuit rejected the use of the strict scrutiny standard.[60] Instead, it conducted an equal protection analysis, and the court applied the level of scrutiny that the United States Supreme Court used when it rejected the assertion that mentally disabled persons were members of a suspect class: a rational relationship standard.[61] The Supreme Court had used a rational relationship standard when evaluating discrimination against the disabled in *City of Cleburne v. Cleburne Living Center* because it determined that disabled persons were not members of a suspect class under traditional equal protection doctrine.[62] Thus, the Eighth Circuit determined that the appropriate analysis for a claim brought under Title VIII is "whether legislation which distinguishes between the mentally impaired and others is 'rationally related to a legitimate governmental purpose.'"[63]

In applying the test, the Eighth Circuit determined that the government's purpose in restricting the proximity of group residential homes was to prevent

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55. *Id.* at 93.

56. *Id.* Although the Eighth Circuit categorizes these restrictions as having a disparate impact, they are more accurately categorized as facially discriminatory restrictions because they expressly singled out homes for the disabled. The district court was similarly confused about the proper theory. Familystyle of St. Paul, Inc. v. City of St. Paul, 728 F. Supp. 1396, 1402 n.9 (D. Minn. 1999) (noting that "[t]he court is unsure of how to use this prima facie case in the context of an allegation of unlawful state and local laws"). Ultimately, this confusion did not matter for the outcome of either opinion, as both courts decided the issue based on the defendant's justification for the ordinance.

57. *Familystyle*, 923 F.2d at 94.

58. *Id.* This burden shifting structure for Title VIII cases brought against a public defendant was established by the Eighth Circuit in *United States v. City of Black Jack*, 508 F.2d 1179 (8th Cir. 1974).

59. *Familystyle*, 923 F.2d at 94.

60. *Id.*

61. *Id.* (citing City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985)).

62. *See* 473 U.S. at 442-47.

63. *Familystyle*, 923 F.2d at 94 (quoting *City of Cleburne*, 473 U.S. at 446).

the institutionalization of mentally ill persons.[64] Further, the court determined that this was a legitimate purpose because it furthered the important goal of helping persons suffering from mental illnesses to integrate into society.[65] Therefore, the city's practice of granting permits in a way that encourages deinstitutionalization did not discriminate against the mentally disabled in violation of the Fair Housing Act.[66]

Five years later, the Eighth Circuit reaffirmed its decision that courts should employ the rational relationship standard for justifying housing discrimination, at least when the discrimination is against the disabled.[67] In *Oxford House*, two group residential homes in St. Louis, Missouri that housed recovering alcoholics and drug addicts challenged a city zoning code that limited the number of unrelated handicapped persons who could reside in a single group home.[68] The homes argued that the zoning code discriminated against handicapped persons by interfering with the housing rights of the residents and therefore violated the Fair Housing Act.[69] The Eighth Circuit rejected this allegation, finding, first, that there was no discrimination because the zoning code actually favored handicapped persons in that "[t]he zoning code allows only three unrelated, nonhandicapped people to reside together in a single family zone, but allows group homes to have up to eight handicapped residents."[70] Further, the Eighth Circuit applied the rational relationship standard and found no violation of the Fair Housing Act.[71] The court determined that the city had "a legitimate interest in decreasing congestion, traffic, and noise in residential areas, and ordinances restricting the number of unrelated people who may occupy a single family residence are

64. *Id.*

65. *Id.*

66. *Id.*

67. *See* Oxford House-C v. City of St. Louis, 77 F.3d 249 (8th Cir. 1996).

68. *Id.* at 250-51. The relevant zoning code defined a "single family dwelling" to include "group homes with eight or fewer unrelated handicapped residents." *Id.* at 251. The district court had determined that "the residents of [the two residential homes were] recovering alcoholics and addicts, and therefore persons with handicaps within the meaning of [the Fair Housing Act]." Oxford House-C v. City of St. Louis, 843 F. Supp. 1556, 1572 (E.D. Mo. 1994).

69. *Oxford House*, 77 F.3d at 251.

70. *Id.* at 251-52.

71. *Id.* at 252. The court made this finding despite its determination that the plaintiff did not make a prima facie case of discrimination. *Id.* In *Familystyle*, the Eighth Circuit explained that the burden only shifted to the defendant to show that the government action was needed to further a governmental interest after the plaintiff made a prima facie case of discrimination. *See supra* text accompanying note 58. It appears that in *Oxford House*, the Eighth Circuit applied the rational relationship test as further support for its rejection of the group homes' claim, even though the court found that there was no discrimination and the burden did not actually shift.

reasonably related to these legitimate goals."[72] Thus, the city zoning code withstood the Fair Housing Act challenge.[73]

III. RECENT DEVELOPMENTS

In 2006, the Ninth Circuit was given the opportunity to weigh in on the circuit split that had developed among the Sixth, Eighth, and Tenth Circuits.[74] Unlike the cases in the other three circuits which involved discrimination on the basis of disability, the Ninth Circuit dealt with the issue in the context of gender and familial discrimination.[75] However, the Ninth Circuit holding is still relevant to the present analysis.

In 1994, the City of Boise worked in conjunction with Community House, Inc. to build a facility that would provide low income housing in addition to housing for homeless persons.[76] In 2004, the City and Community House, Inc. determined that they were no longer able to work together and, after a bidding process, the City selected Boise Rescue Mission Ministries to take over the operation of Community House.[77] Part of the winning bid contained a plan to change Community House from a co-ed facility to one that would house only males.[78] As a part of the transitional process, all of the people who were living in Community House in August 2005, including men, were told that they had to leave and find alternative housing.[79] Subsequently, men would be permitted to re-apply for residence at Community House, but women and children could not.[80] Boise had already been experiencing a housing shortage and the additional strain on the market forced the former residents to turn to less than desirable housing, causing a "significant hard-

72. *Oxford House*, 77 F.3d at 252.

73. *Id.* at 253.

74. *See* Cmty. House, Inc. v. City of Boise, 468 F.3d 1118 (9th Cir. 2006), *reh'g denied and opinion amended by* 490 F.3d 1041 (9th Cir. 2007).

75. *See generally id.*

76. *Id.* at 1121. The facility, which was called Community House and was operated by Community House, Inc., housed "sixty-six men, thirteen women, and ten families" in the homeless shelter, while the low income housing portion "contained ten family units and thirty-nine single-resident apartments." *Id.*

77. *Id.*

78. *Id.* at 1122. There was also some talk of eventually converting another homeless shelter and low-income housing facility run by Boise Rescue Mission Ministries into a facility that would house only women and children. *Id.* The plan to change the facility from a co-ed facility to a males-only facility was established due to a belief "that the difficulties of serving the homeless population 'are exacerbated in a mixed gender shelter environment.'" *Id.* This idea was not new to Boise Rescue Mission Ministries either. All of the organization's facilities in Boise house either only men or only women and children. *Id.* It also houses single persons separately from families. *Id.*

79. *Id.*

80. *Id.*

ship for some residents, most notably women, families, and the physically disabled."[81]

Several of the affected former residents filed a lawsuit against the City of Boise, alleging that the eviction of the former residents of Community House violated the Fair Housing Act.[82] The residents also sought an injunction to prevent the City from forcing them to leave the facility and from prohibiting women and families from reapplying for housing at Community House.[83] The United States District Court for the District of Idaho denied the injunction that would prevent the removal of residents and the prohibition on women residents.[84] The district court determined that women and families were being treated differently than men, because once they moved out, they were not allowed to reapply to live in Community House, like the former male residents were permitted to do.[85] However, the court then applied the *McDonnell-Douglas* burden shifting structure.[86] This analysis is used in cases where the evidence of discriminatory intent is purely circumstantial,[87] which requires that defendants be given the opportunity to demonstrate that there was a "legitimate, nondiscriminatory reason for [their] conduct."[88] Finding that the City had established two legitimate reasons for its conduct – safety concerns and the conversion process – the court rejected the allegation that the City was discriminating against women and families.[89]

On appeal, the Ninth Circuit rejected the district court's application of the *McDonnell-Douglas* burden shifting structure.[90] The court reasoned that since the City admitted that Community House would be a housing facility only available for single men, the case involves a facially discriminatory policy that unambiguously treats single men more favorably than women and families.[91] When there is a facially discriminatory policy, the court determined that a plaintiff establishes a prima facie case of intentional discrimina-

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81. *Id.* One of the former disabled residents was forced to move into a rundown mobile home in which the "'toilet was leaking, the front steps into the mobile home were unstable, there [was] no handrail on the front steps, and there [was] mold and mildew on the walls and floors.'" Cmty. House, Inc. v. City of Boise, No. CV-05-283-S-BLW, 2005 WL 2847390, at *3 (D. Idaho Oct. 28, 2005).

82. *Cmty. House, Inc.*, 2005 WL 2847390, at *3.

83. *Id.*

84. *Id.* at *7.

85. *Id.* at *5.

86. *Id.*; *see also* Gilligan v. Jamco Dev. Corp., 108 F.3d 246, 249 (9th Cir. 1997) (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).

87. Puente v. Potter, No. SA-05-CA-747-XR, 2007 WL 869584, at *4 (W.D. Tex. Mar. 20, 2007).

88. *Cmty. House, Inc.*, 2005 WL 2847390, at *5.

89. *Id.*

90. *See* Cmty. House, Inc. v. City of Boise, 468 F.3d 1118, 1123 (9th Cir. 2006), *reh'g denied and opinion amended by* 490 F.3d 1041 (9th Cir. 2007).

91. *Id.* at 1123-24.

tion by simply pointing to the policy.[92] Once the plaintiff does so, no explanation by the defendant can convert a facially discriminatory policy into one that does not discriminate.[93] The court further noted, however, that differential treatment itself is not always prohibited, so a defendant must be given the opportunity to justify the treatment under the Fair Housing Act.[94]

The court then examined the split among the Eighth Circuit and the Sixth and Tenth Circuits to determine the appropriate standard to apply to the defendant's justification for the discrimination. The Ninth Circuit ultimately adopted the standard used by the Sixth and Tenth Circuits: "a defendant must show either: (1) that the restriction benefits the protected class or (2) that it responds to legitimate safety concerns raised by the individuals affected, rather than being based on stereotypes."[95] In so holding, the court found that "the Eighth Circuit's approach is inappropriate for Fair Housing Act claims because some classes of persons specifically protected by the Fair Housing Act, such as families and the handicapped, are not protected classes for constitutional purposes."[96]

In applying the newly adopted standard, the Ninth Circuit examined the two justifications that the district court had determined were sufficient to justify the City's differential treatment: safety concerns and the conversion process.[97] On the safety issue, the only evidence the City offered to justify the separation of men from women and singles from families was the opinion of the Executive Director of Boise Rescue Mission Ministries that the organization's policy of separation made its other facilities safer than Community House.[98] The court determined that this opinion alone was not enough to justify the facially discriminatory restriction, stating that "[o]ther than [the Executive Director's] opinion, the City did not submit a single police report, incident report, or any other documentation that supported any safety concerns."[99] While not completely dismissing the idea that a homeless shelter

92. *See id.* at 1125.

93. *See id.*

94. *Id.*

95. *Id.* (citing Bangerter v. Orem City Corp., 46 F.3d 1491 (10th Cir. 1995) and Larkin v. State of Mich. Dept. of Soc. Servs., 89 F.3d 285 (6th Cir. 1996)).

96. *Id.* at 1125-26.

97. *Id.* at 1126. *See also supra* text accompanying note 89.

98. *Cmty. House, Inc.*, 468 F.3d at 1126. The Executive Director stated in an affidavit that "'[a]s a person with nearly 20 years of experience serving the homeless, it is my opinion that mixing disparate populations in the same sleeping facility unnecessarily fosters conflicts.'" *Id.* He further stated his belief "'that our separate shelter facilities for men and women is one of the reasons why we have fewer police calls at our facilities than Community House. For example, in 2004, all five of Rescue Mission's facilities combined had less than one-half of the police calls of Community House.'" *Id.*

99. *Id.* The court also noted that the "fewer police calls" relied on by the Executive Director could be explained by any number of reasons, including the total number

may be able to justify a separation like the one proposed by the City due to safety concerns, the court determined that the safety concerns presented to the court by the City and Boise Rescue Mission Ministries did not justify the City of Boise's actions at that time.[100]

On the issue of the second alleged justification, the conversion process, the City alleged that removing women and families from the Community House facility was necessary so that it would be possible to convert another facility to one that would serve only women and families.[101] The court, however, took note of the fact that Boise Rescue Mission Ministries had no legal obligation with the City to convert the second facility into one that would indeed serve only women and families.[102] In fact, the court pointed out that Boise Rescue Mission Ministries made it clear to the City that there was a chance that the second facility would never be converted as anticipated.[103] This was enough for the court to determine that the conversion process could not justify the facially discriminatory policy implemented by the City.[104] Thus, the Ninth Circuit held that the City could not prevent the former women and family residents of Community House from reapplying to live in the facility under the new management.[105]

IV. DISCUSSION

With the Ninth Circuit's decision in *Community House, Inc.*,[106] it is clear that the Eighth Circuit is the definite outlier with its application of principles from equal protection jurisprudence to cases involving discrimination arising under the Fair Housing Act.[107] None of the other United States Courts of Appeals that have decided the issue have adopted the standard set forth by

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of residents or the number of disabled residents who are more likely to require emergency medical service than other residents. *Id.*

100. *Id.* at 1127.

101. *Id.*

102. *Id.*

103. *Id.* In its opinion, the court noted that Boise Rescue Mission Ministries said that

> "we currently contemplate that we would convert the 6th & Front . . . facility into an emergency homeless shelter for women and children. Because owning Community House is only a possibility, we have not done any planning, feasibility studies, or other evaluations . . . . Those studies may indicate that an emergency shelter for women and children is infeasible at our 6th & Front site."

Id.

104. *Id.*

105. *Id.* at 1135.

106. *See supra* notes 90-105 and accompanying text.

107. *See supra* text accompanying note 61.

the Eighth Circuit[108] in *Familystyle*[109] and *Oxford House*.[110] This refusal to adopt is for good reason.

First, the Eighth Circuit's position is analytically flawed. Essentially, the court viewed the ordinances at issue in *Familystyle* and *Oxford House* as if the Fair Housing Act did not even exist. Instead, it turned to the Fourteenth Amendment's equal protection doctrine and, because disability is not a suspect class, applied rational basis review to the ordinances.[111] But, of course, the Fair Housing Act does exist, and it specifically protects the disabled from housing discrimination.[112] The question for the court in both of these cases was not whether the City could permissibly discriminate against the disabled under the Fourteenth Amendment; rather, the issue was whether the City was discriminating against disabled persons *in violation of the Fair Housing Act*. In fact, the Tenth Circuit in *Bangerter* recognized this distinction in its criticism of *Familystyle* when it noted: "the use of an [e]qual [p]rotection analysis is misplaced here because this case involves a federal statute and not the Fourteenth Amendment."[113]

Second, and perhaps more importantly, the Eighth Circuit's standard fails to sufficiently protect particular groups of people from discrimination in housing, as intended by the Fair Housing Act. The Eighth Circuit's adoption of the rational relationship standard is a much lower standard than the one applied by the Sixth, Tenth, and now the Ninth Circuits.[114] The standard used

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108. Jeffrey O. v. City of Boca Raton, 511 F. Supp. 2d 1339, 1350 (S.D. Fla. 2007) (stating "[t]he Eighth Circuit was the first to develop a test to be used in these situations, but none of the other circuits confronted with the issue have chosen to follow the Eighth Circuit's analysis").

109. *See supra* notes 50-66 and accompanying text.

110. *See supra* notes 67-73 and accompanying text.

111. *See supra* notes 58-63 and accompanying text.

112. *See* 42 U.S.C. § 3604(f)(1) (2006) (making it unlawful "[t]o discriminate in the sale or rental, or to otherwise make unavailable or deny, a dwelling to any buyer or renter because of a handicap").

113. Bangerter v. Orem City Corp., 46 F.3d 1491, 1503 (10th Cir. 1995).

114. The rational relationship test requires only that the legislation be "'rationally related to a legitimate governmental purpose.'" Familystyle of St. Paul, Inc. v. City of St. Paul, 923 F.2d 91, 94 (8th Cir. 1991) (quoting City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446 (1985)); *see also supra* text accompanying note 63. The standard applied by the Sixth, Ninth, and Tenth Circuits, on the other hand, requires a defendant to show "(1) that the restriction benefits the protected class or (2) that it responds to legitimate safety concerns raised by the individuals affected, rather than being based on stereotypes." Cmty. House, Inc. v. City of Boise, 468 F.3d 1118, 1125 (9th Cir. 2006) (citing Bangerter v. Orem City Corp., 46 F.3d 1491 (10th Cir. 1995) and Larkin v. State of Mich. Dept. of Soc. Servs., 89 F.3d 285 (6th Cir. 1996)).

It is important to note that the only level of scrutiny that the Eighth Circuit has applied to discrimination cases arising under the Fair Housing Act (as amended in 1988) is the rational relationship standard, applied to discrimination on the basis of disability. *See* discussion *supra* Part II.C. It appears that the Eighth Circuit would

by the majority of circuits is much more specific and requires a more rigorous review of the government's reason for enacting the legislation. For example, it would be possible under the Sixth, Ninth, and Tenth Circuits' standard for a restriction that adversely affects disabled persons to be based on a seemingly legitimate concern, but still be discriminatory, and therefore prohibited, under the Fair Housing Act. However, the same restriction would likely withstand a challenge in the Eighth Circuit because the court "'will look very deferentially at the government action at issue, would require less justification for it, and would be relatively unwilling and unlikely to strike down the action.'"[115]

This situation is apparent from the cases surveyed in this Summary. In *Larkin*, the Sixth Circuit struck down a spacing requirement for all adult foster care centers, rejecting the State of Michigan's argument that the spacing requirement furthered the goal of preventing the institutionalization of disabled citizens.[116] In *Familystyle*, on the other hand, the Eighth Circuit upheld a similar state law and city zoning code that imposed a spacing requirement on all community residential facilities for the mentally disabled, holding that the state's goal of preventing the institutionalization of the mentally disabled was sufficient to justify the laws.[117]

The Eighth Circuit's rational relationship standard does not rigorously protect certain classes of people in the manner that Congress intended when it enacted the present Fair Housing Act. The 1988 Amendments to the Fair Housing Act added protection against discrimination based on familial status and disability after Congress heard evidence of pervasive discrimination against both groups of people.[118] By adding these non-suspect classes to the

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apply the level of scrutiny used in equal protection cases for other types of discrimination, such as strict scrutiny for racial discrimination cases. *See* United States v. City of Black Jack, 508 F.2d 1179, 1186 (8th Cir. 1974) (stating that "the burden shifted to the City to demonstrate that a compelling government interest was furthered by that ordinance"). Strict scrutiny does not present as many problems as the lower standards of scrutiny present, but many of the characteristics protected by the Fair Housing Act are not subject to strict scrutiny, such as disability, gender, and familial status.

115. Daniel F. Cardile, *Community Housing Trust: A Fair Standard for the Fair Housing Amendments Act*, 21 J. CONTEMP. HEALTH L. & POL'Y 205, 222 (2005) (quoting WILLIAM KAPLIN, CONCEPTS AND METHODS OF CONSTITUTIONAL LAW 56 (1992)).

116. *See Larkin*, 89 F.3d 285; *see also supra* notes 36-49 and accompanying text.

117. *See Familystyle*, 923 F.2d 91; *see also supra* notes 50-66 and accompanying text.

118. H.R. REP. NO. 100-711, at 13 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 2173, 2174. In regard to the addition of protection for disabled persons, the Judiciary Committee explained that:

> [p]rohibiting discrimination against individuals with handicaps is a major step in changing the stereotypes that have served to exclude them from American life. These persons have been denied housing because of misperceptions, ignorance, and outright prejudice. The Fair Housing Amen-

groups protected by the Fair Housing Act, Congress clearly intended to offer greater protection to families and to the disabled than would otherwise be afforded without such provisions in place.[119]

If every court used the Eighth Circuit's standard based on equal protection jurisprudence, it would be very difficult to get many facially discriminatory laws overturned, especially those that discriminate on the basis of disability or familial status, both non-suspect classes. All the government would have to do is point to some seemingly legitimate justification, and it is highly likely that the reviewing court will defer to that justification and permit the discrimination to continue. Further, as one commentator noted, the rational relationship standard presents an opportunity for a state, city, or even a court to look at community concerns to justify a discriminatory housing policy, instead of focusing on concerns for the needs of the classes protected by the Fair Housing Act.[120] It is difficult to legitimately argue that a system that virtually operates as a rubber stamp approval system of restrictions on housing "provide[s] an effective enforcement system to make [the prohibition on discriminatory housing practices] a reality."[121]

The standard used by the Sixth, Ninth, and Tenth Circuits is more consistent with the purpose of the Fair Housing Act. These circuits limit the possible bases for justifying any facially discriminatory law or ordinance to

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> dements [sic] Act . . . is a clear pronouncement of a national commitment to end the unnecessary exclusion of persons with handicaps from the American mainstream. It repudiates the use of stereotypes and ignorance, and mandates that persons with handicaps be considered as individuals. Generalized perceptions about disabilities and unfounded speculations about threats to safety are specifically rejected as grounds to justify exclusion.

Id. at 18. In regard to the addition of protection against discrimination based on familial status, the Judiciary Committee noted that:

> [i]n many parts of the country, families with children are refused housing despite their ability to pay for it . . . . In 1949, the federal government made a commitment to "provide a decent and suitable living environment for every American family." Nearly 40 years after this commitment, however, discrimination against families with children prevents millions of American families from realizing this goal.

Id. at 19.

119. In fact, the Judiciary Committee specifically discussed its intent to broaden the protection afforded to disabled persons, after the United States Supreme Court's decision in *City of Cleburne v. Cleburne Living Center*. *Id.* at 24 (citing *City of Cleburne*, 473 U.S. 435 (1985)) (explaining that "[w]hile state and local governments have authority to protect safety and health, and to regulate the use of land, that authority has sometimes been used to restrict the ability of individuals with handicaps to live in communities").

120. Cardile, *supra* note 115, at 223 (stating that "in justifying their holding in Oxford House-C [sic], the Eighth Circuit focused solely on the concerns of the community and not the needs of the handicapped residents").

121. H.R. REP. NO. 100-711, at 13.

one that imposes a beneficial restriction or one that is enacted for safety concerns of the protected class.[122] This means that a city or state can still place facially discriminatory restrictions on housing options for protected classes of people. However, these restrictions will only be permitted when they further the interests of those who are being restricted. Thus, the standard forces the court to focus on the needs of the individual members of the protected classes, which is consistent with the policy of the Fair Housing Act "to provide, within constitutional limitations, for fair housing *throughout* the United States."[123] Further, and perhaps most importantly, the more stringent justification standard encourages persons adversely affected by discriminatory policies and practices to expose wrongdoing because they are more likely to prevail than they would be under a rational relationship standard.[124]

The Eighth Circuit's rational relationship standard is improper and inconsistent with the purposes of the Fair Housing Act, but the court has applied the same standard to disability discrimination cases for more than sixteen years.[125] Thus, it appears unlikely that the Eighth Circuit will decide to change the course of its Fair Housing Act decisions in the near future. Because the Eighth Circuit standard does not fully protect persons against housing discrimination on the basis of sex, familial status, or handicap, as proscribed by the Fair Housing Act,[126] the United States Supreme Court should grant certiorari to settle the issue once and for all.

In its decision, the Supreme Court should consider the fact that the Eighth Circuit's rational relationship standard from equal protection jurisprudence fails to protect against discrimination in housing as intended by Congress, and that such a standard would make challenging certain types of dis-

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122. *See supra* text accompanying note 95.

123. 42 U.S.C. § 3601 (2006) (emphasis added).

124. The Judge David L. Bazelon Center for Mental Health Law, an advocate for fair housing for people with mental disabilities, pointed out the following on its website: "the Eighth Circuit Court of Appeals is alone in adopting a standard for reviewing zoning ordinances that is highly deferential to local governments . . . . Advocates are cautioned about bringing such cases in federal courts in the states governed by Eighth Circuit precedent." Judge David L. Bazelon Center for Mental Health Law, *Fair Housing Advocacy*, http://www.bazelon.org/issues/housing/advocacy.htm (last visited Nov. 3, 2007).

125. *Familystyle*, the first Eighth Circuit case to address the issue of what standard to apply in analyzing a defendant's proffered justifications for a facially discriminatory housing policy, was decided on January 8, 1991. *See* Familystyle of St. Paul, Inc. v. City of St. Paul, 923 F.2d 91 (8th Cir. 1991).

126. *See* 42 U.S.C. § 3604(a), (f). As noted previously, the Eighth Circuit would likely apply strict scrutiny to claims brought by members of the other groups protected under the Fair Housing Act (race, color, religion, and national origin), because such categories are considered suspect classes deserving of the highest level of scrutiny in equal protection analysis. Sex, however, only gets intermediate scrutiny, and neither disability nor familial status is considered a suspect class at all. *See supra* note 114.

criminatory housing policies virtually impossible.[127] Further, the Supreme Court should examine the standard used by the Sixth, Ninth, and Tenth Circuits and take note of the fact that, while the standard encourages the exposure of discriminatory housing policies, it still leaves open the possibility of imposing facially discriminatory restrictions on protected groups of people when necessary.[128] Upon taking all of these considerations into account, the Supreme Court should ultimately adopt the standard employed by the Sixth, Ninth, and Tenth Circuits and hold that in order to justify a facially discriminatory housing restriction, the defendant must show either "(1) that the restriction benefits the protected class or (2) that it responds to legitimate safety concerns raised by the individuals affected, rather than being based on stereotypes."[129]

V. CONCLUSION

Although the Fair Housing Act generally prohibits discriminatory housing ordinances and other restrictions, some facially discriminatory restrictions are permitted when the defendant can justify them due to some overriding concern. In determining what standard to apply to the defendant's justification, the Eighth Circuit settled on a less rigorous standard for many types of discrimination that gives substantial deference to the state or city action, whereas the Sixth, Ninth, and Tenth Circuits all utilize a stricter standard that limits the justifications that can be successfully offered. The standard used by the Sixth, Ninth and Tenth Circuits is more consistent with the amended Fair Housing Act's goal of protecting more groups of people from housing discrimination than would otherwise be protected under the Fourteenth Amendment. This should be the standard employed by the Eighth Circuit and, if the court does not adopt the more stringent standard on its own, the United States Supreme Court should intervene and force the Eighth Circuit to make this important change.

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127. *See supra* notes 120-21 and accompanying text.

128. *See supra* notes 122-24 and accompanying text.

129. Cmty. House, Inc. v. City of Boise, 468 F.3d 1118, 1125 (9th Cir. 2006) (citing Bangerter v. Orem City Corp., 46 F.3d 1491 (10th Cir. 1995) and Larkin v. State of Mich. Dept. of Soc. Servs., 89 F.3d 285 (6th Cir. 1996)).